

## **§ 217.179**

or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the FEDERAL REGISTER.

(d) Adaptive Management—NMFS may modify or augment the existing mitigation or monitoring measures (after consulting with Neptune regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

- (1) Results from Neptune's monitoring from the previous year;
- (2) Results from general marine mammal and sound research; or
- (3) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

## **§ 217.179 Modifications of Letters of Authorization.**

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization issued by NMFS, pursuant to §§ 216.106 and 217.177 of this chapter and subject to the provisions of this subpart shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 217.178, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 217.172(b), a Letter of Authorization issued pursuant to §§ 216.106 and 217.177 of this chapter may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the FED-

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ERAL REGISTER within 30 days subsequent to the action.

## **Subparts S–T [Reserved]**

## **Subpart U—Taking Of Marine Mammals Incidental To The Port of Anchorage Marine Terminal Redevelopment Project**

### **§ 217.200 Specified activities and specified geographical region.**

(a) Regulations in this subpart apply only to the incidental taking of those marine mammals specified in § 217.202(b) by the Port of Anchorage and the U.S. Department of Transportation Maritime Administration (MARAD), and those persons it authorizes to engage in construction activities associated with the Port of Anchorage Marine Terminal Redevelopment Project, specifically in-water pile driving, at the Port of Anchorage, Alaska.

(b) [Reserved]

### **§ 217.201 Effective dates.**

Regulations in this subpart are effective from July 15, 2009, through July 14, 2014.

### **§ 217.202 Permissible methods of taking.**

(a) Under Letters of Authorization issued pursuant to § 216.106 of this chapter and § 217.207, the Port of Anchorage and MARAD, and persons under their authority, may incidentally, but not intentionally, take marine mammals by harassment, within the area described in § 217.200, provided the activity is in compliance with all terms, conditions, and requirements of these regulations and the appropriate Letter of Authorization.

(b) The taking of marine mammals under a Letter of Authorization is limited to the incidental take, by Level B harassment only, of the following species under the activities identified in § 217.200(a): Cook Inlet beluga whales (*Delphinapterus leucas*), harbor seals (*Phoca vitulina*), harbor porpoises (*Phocoena phocoena*), and killer whales (*Orcinus orca*).

(c) The taking by injury or death of the species listed in paragraph (b) of

this section or the taking by Level B harassment, injury or death of any other marine mammal species is prohibited and may result in the modification, suspension, or revocation of a Letter of Authorization.

#### § 217.203 Prohibitions.

Notwithstanding takings contemplated in § 217.202(b) and authorized by a Letter of Authorization issued under § 216.106 of this chapter and § 217.207, no person in connection with the activities described in § 217.200 may:

(a) Take any marine mammal not specified in § 217.202(b);

(b) Take any marine mammal specified in § 217.202(b) other than by incidental, unintentional Level B harassment;

(c) Take a marine mammal specified in § 217.202(b) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a Letter of Authorization issued under § 216.106 of this chapter and § 217.207.

#### § 217.204 Mitigation.

(a) When conducting operations identified in § 217.200(a), the mitigation measures contained in the Letter of Authorization, issued under § 216.106 of this chapter and § 217.207, must be implemented. These mitigation measures are:

(1) Through monitoring described under § 217.205, the Holder of a Letter of Authorization will ensure that no marine mammal is subjected to a sound pressure levels of 190 or 180 dB re: 1 microPa or greater for pinnipeds and cetaceans, respectively. If a marine mammal is detected within or approaching a distance 200 m from in-water pile driving or in-water chipping, operations shall be immediately delayed or suspended until the marine mammal moves outside these designated zones or the animal is not detected within 15 minutes of the last sighting.

(2) If a marine mammal is detected within or approaching the Level B harassment zone designated for impact pile driving (350 m) prior to in-water

impact pile driving, operations shall not commence until the animal moves outside this zone or it is not detected within 15 minutes of the last sighting.

(3) If a marine mammal is detected within or approaching the Level B harassment zone designated for vibratory pile driving (1,300 m) prior to in-water vibratory pile driving, operations shall not commence until the marine mammal moves outside this zone or it is not detected within 15 minutes of the last sighting.

(4) A start'' technique shall be used at the beginning of each day's in-water pile driving activities or if pile driving has ceased for more than one hour to allow any marine mammal that may be in the immediate area to leave before piling driving reaches full energy. For vibratory hammers, the soft start requires the holder of the Letter of Authorization to initiate noise from the hammers for 15 seconds at reduced energy followed by 1-minute waiting period and repeat the procedure two additional times. If an impact hammer is used, the soft start requires an initial set of three strikes from the impact hammer at 40 percent energy, followed by a one minute waiting period, then two subsequent 3 strike sets.

(5) In-water pile driving or chipping shall not occur when conditions restrict clear, visible detection of all waters within the appropriate harassment zones or the 200 m safety zone. Such conditions that can impair sightability include, but are not limited to, fog and rough sea state.

(6) In-water piles will be driven with a vibratory hammer to the maximum extent possible (i.e., until a desired depth is achieved or to refusal) prior to using an impact hammer.

(7) In-water impact pile driving shall not occur during the period from two hours before low tide until two hours after low tide.

(8) The following measures apply to all in-water pile driving, except during the ''stabbing'' phase, and all in-water chipping associated with demolition of the existing dock:

(i) No in-water pile driving (impact or vibratory) or chipping shall occur if any marine mammal is located within 200m of the hammer in any direction. If any marine mammal is sighted within